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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. 1085

JOSEPH A. RICH,

Petitioner,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY, a Railroad Corporation,

Respondent.

PETITIONER'S REPLY BRIEF

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ARGUMENT[1]

Question 1. — Negligence of Doctors as Agents of Respondent-Railroad. (See P 11-14)

Respondent's assertion that petitioner-employee consulted Dr. Center and Dr. Fox as "private" doctors relies heavily on mis-statements of the evidence.

[1] "T" symbolizes the certified transcript, "P" the Petition for Writ of Certiorari, "PA" the Appendix at the end of the Petition, and "B" respondent's Brief in Opposition to the Petition.

First, petitioner did not seek their "medical attention on his own without reference to the railroad" (B 4). Petitioner testified that after getting sick on the job and being taken to the depot **another** railroad agent there chose Dr. Center (whom petitioner had never seen before) and sent petitioner to Dr. Center in a car driven by a company employee (R 134-135). Dr. Center, respondent's Clearwater doctor (T 201), referred petitioner to Dr. Fox, respondent's St. Petersburg doctor, if further treatment was needed (T 203).

Second, it is not true that both doctors diagnosed petitioner's rash as a reaction to tomatoes or strawberries and did not consider its treatment a "railroad case" (B 4). Dr. Center never diagnosed the cause of the rash nor its status as an allergy and Dr. Center never decided whether or not it was a railroad case (T 202).

Respondent has also misconstrued the legal effect of various evidence. Neither petitioner's payment of the minimal bills to Dr. Center and Dr. Fox (and note that as Dr. Center was well aware, he thus avoided the railroad's "umpteen forms", T 205) nor Dr. Fox's legal conclusion that he saw petitioner as a private patient controls the question of "agency" for FELA purposes. Such "agency" is determined by the evidence of agency (P 5-7) and "operational activity" test (perhaps also by the "financial benefit" test) as set forth with relevant citations in the Petition (P 11-14).[2] Respondent contends that "Medical Treatment [is] Not An Operational Activity" (B 5-6) since a railroad is not required to "furnish" its employees

[2]See also *Collins v. Monongehela*, W.D. Pa. 1964, 235 F.Supp. 127, 128-129.

"medical attention by private doctors". This argument begs the question of whether Dr. Center and Dr. Fox were petitioner's purely private doctors or were respondent's agents for FELA purposes, when treating petitioner and returning him to work, by assuming the former. The fact of the matter is that respondent **did** "furnish" petitioner medical treatment for his skin rash by having him taken to Dr. Center, when he got the rash while working, and having him examined and treated by Dr. Center before being put back on the job **within a half-hour or so** (T 334). Had respondent ordered petitioner, when he got sick while working, to mark off sick and go home or seek and select medical aid "on his own", the case would be an entirely different one. But respondent sought and received (1) its doctor's examination and treatment of its employee who became ill while working and (2) its doctor's acquiescence in petitioner's return to work for the remainder of the day. Surely respondent's action in "furnishing" medical treatment to an employee who became sick while working so that he might (and did) return to work that day "was an operational activity of the railroad" and was within "the railroad's chartered powers or operations" (using respondent's own language at B 6). Surely the further treatment furnished petitioner two days later by the second railroad doctor (to whom petitioner was referred by the first one) and his advice to petitioner to return to work was similarly an occupational activity of respondent.

Respondent contends that furnishing medical treatment is **not** an operational activity of a railroad under **Sinkler v. Missouri P. R. Co.**, 356 US 326, because **Davis v. Virginian R. Co.**, 361 US 354, did not so hold and because **Hopson v. Texaco**, 383 US 262, was based entirely on the statutory duty of a shipowner to transport an ill sailor to

the U. S. Consul (B 6). The **Davis** case, **supra**, held that insufficient proof of malpractice was presented by the plaintiff and **this Court therefore determined that it "need not pass" on the issue of whether or not the railroad "would be liable for any negligence on the part of Dr. Leigh"** (361 US at 357). The **Hopson** case, **supra**, finds agency not only on account of the statutory duty involved **but also because the "seamen were in the service of the ship and the ill-fated journey to Port of Spain was a vital part of the ship's total operations"** (383 US at 264).

Respondent quotes (B 6-7) and relies on the Florida Supreme Court's holding that the Florida District Court of Appeal's rule (restricting railroad responsibility for its doctor's malpractice to cases where the railroad has actual or constructive knowledge of the doctor's unfitness) is "correct... approved and affirmed" where the doctors are independent contractors, as "[i]n the instant case", although the rule "might well not apply" if the doctors were employees (PA 6-7). Suffice to say that petitioner knows of no case in which this Court has distinguished between independent contractors and employees with reference to the "operational activity" test of agency for FELA purposes. Indeed, any such distinction would violate the "accommodating-scope" to be given "the word 'agents'" under **Sinkler v. Missouri Pacific R. Co.**, 356 US 326, 329-331 and **Hopson v. Texaco**, 383 US 262.

Lastly, respondent asserts that there is no evidence of malpractice by the doctors, because there was no showing of a relevant recognized medical community standard and departure therefrom, citing **Davis v. Virginian Railway Co.**, 361 US 354. Petitioner proved negligence in that Dr. Center and Dr. Fox treated his rash with pyrabenza-

mine, a drug often producing dizziness, drowsiness and slow thinking (see Dr. Holmes' expert testimony, T 273) **without warning petitioner or respondent of such known side effects and without telling petitioner or respondent that petitioner was therefore unfit to return to work as a railroad employee known to be working with trains and other heavy machinery.** Petitioner proved the doctor's negligence in prescribing the right medication at the wrong time and the wrong place, ie. while the doctors knew plaintiff was working with and near heavy moving machinery on the job. Under Florida malpractice law "negligence in the application or administration of an approved medical treatment" does not require expert testimony, **Atkins v. Humes**, Fla. 1959, 110 So.2d 663, 666 (and see cases cited therein). One need not be a medical expert to determine that returning a railroad employee to work while mentally confused is unreasonable or negligent under the circumstances in the case at bar. (See also **Montgomery v. Stary**, Fla. 1955, 84 So.2d 34, 40, for the rule that expert testimony is not needed with reference to causation in a case such as this). Petitioner submits that the necessity of evidence of a "recognized medical standard for the treatment of such a fracture" as was involved in **Davis v. Virginian Railway Co., supra**, does not require specific expert evidence of a "recognized medical standard" for not returning a railroad employee to work with heavy machinery while he is under the influence of a drug which impairs his mental and physical coordination.

Question 2. — Denial of Directed Verdict on Liability.
(See P 14-16)

Respondent misconceives the Petition herein by stating that the court cannot direct a verdict on liability in a

FELA case "even though the proof warrants a conclusion of negligence" and asserting that Question 2 (as well as Questions 3 and 4) "do not warrant a digging and searching of the record of the trial..." (B 7).

Petitioner contends that he was entitled to a directed verdict on liability because the evidence **conclusively established** that the railroad's negligence played some part in producing his fractured leg and permanent disability, not that the evidence merely warranted a conclusion of negligence.

Petitioner also notes that the over-4 page "Summary of Evidence" in the Petition (P 5-9) contains explicit citations to the relevant portions of the certified transcript, citations not challenged by respondent.

Question 3. — Manifest Weight of the Evidence. (See P 16)

Respondent's bare assertion (B 7) that the evidence and reasonable inferences support the jury's verdict does not in any way meet the contrary position as set forth in the Petition. Rather than repeating the material, petitioner will refer to the evidence previously summarized with citations to the certified transcript (P 5-9) and the weight to be given such evidence as previously discussed (P 15-16).

Question 4. — Denial of Charge on Sudden Peril Doctrine. (See P 16-17)

Petitioner does not understand the thrust of respondent's argument concerning this point (R 7-8).

The requested charge reads as follows:

> "In determining whether the plaintiff was guilty of contributory negligence which proximately caused his injuries, if any, I instruct you that a person placed in sudden peril not created by his own negligence is not held to the same degree of presence of mind and care which is required under ordinary circumstances. Acts done under the stimulus of sudden peril or in case of emergency requiring immediate action are not to be judged by the same standard as that applicable where the actor has ample time for reflection and intelligent choice of means."

The requested charge dealt with petitioner's actions "under the stimulus of sudden peril or in case of emergency requiring immediate action...." It would seem clear that unexpectedly having to board a moving train when one's coordination is impaired and one is mentally confused presents an instance of "sudden peril". It would seem equally clear that unexpectedly having to stop a moving train from proceeding over a jacked-up bridge with potential damage to life as well as property presents a "case of emergency".

The denial of the requested charge was not harmless error, as respondent contends (B 8), because the general contributory negligence charge referred to reasonable actions under the same or similar circumstances. Such general charge does not properly inform the jury of the reduced standard of care applicable in cases of sudden peril or emergency.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

By_____

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CERTIFICATE OF SERVICE

I, IRMA ROBBINS FEDER, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on April 24, 1967, I served a true and correct copy of the foregoing Petitioner's Reply Brief on the Respondent by mailing a copy thereof in a duly addressed envelope to DIXON, DeJARNETTE, BRADFORD, WILLIAMS, McKAY & KIMBRELL, Attorneys for Respondent, 9th Floor, Dade Federal Building, Miami, Florida 33131.

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